I

DIRECT MARKETING ASSOCIATION

GUIDELINES

for...

Ethical Business Practice

THE DMA

Direct Marketing Association

The Direct Marketing Association's Guidelines for Ethical Business Practice are intended to provide individuals and organizations involved in direct marketing in all media with generally accepted principles of conduct. These guidelines reflect The DMA's long-standing policy of high levels of ethics and the responsibility of the Association, its members, and all marketers to maintain consumer and community relationships that are based on fair and ethical principles. In addition to providing general guidance to the industry, the Guidelines for Ethical Business Practice are used by The DMA's Committee on Ethical Business Practice, an industry peer review committee, as the standard to which direct marketing promotions that are the subject of complaint to The DMA are compared.

These self-regulatory guidelines are intended to be honored in light of their aims and principles. All marketers should support the guidelines in spirit and not treat their provisions as obstacles to be circumvented by legal ingenuity.

These guidelines also represent The DMA's general philosophy that self-regulatory measures are preferable to governmental mandates. Self-regulatory actions are more readily adaptable to changing techniques and economic and social conditions. They encourage widespread use of sound business practices.

Because dishonest, misleading or offensive communications discredit all means of advertising and marketing, including direct marketing, observance of these guidelines by all concerned is expected. All persons involved in direct marketing should take reasonable steps to encourage other industry members to follow these guidelines as well.

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The Terms of the Offer

HONESTY AND CLARITY OF OFFER

Article #1

All offers should be clear, honest and complete so that the consumer may know the exact nature of what is being offered, the price, the terms of payment (including all extra charges) and the commitment involved in the placing of an order. Before publication of an offer, marketers should be prepared to substantiate any claims or offers made. Advertisements or specific claims that are untrue, misleading, deceptive or fraudulent should not be used.

ACCURACY AND CONSISTENCY

Article #2

Simple and consistent statements or representations of all the essential points of the offer should appear in the promotional material. The overall impression of an offer should not be contradicted by individual statements, representations or disclaimers.

CLARITY OF REPRESENTATIONS

Article #3

Representations which, by their size, placement, duration or other characteristics are unlikely to be noticed or are difficult to understand should not be used if they are material to the offer.

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All descriptions, promises and claims of limitation should be in accordance with actual conditions, situations and circumstances existing at the time of the promotion.

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Every offer and shipment should clearly identify the marketer's name and postal address or telephone number, or both, at which the consumer may obtain service. If an offer is made online, an e-mail address should also be identified.

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MARKETING TO CHILDREN
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Offers and the manner in which they are presented that are suitable for adults only should not be made to children. In determining the suitability of a communication with children online or in any other medium, marketers should address the age range, knowledge, sophistication and maturity of their intended audience.

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Marketers should provide notice and an opportunity to opt out of the marketing process so that parents have the ability to limit the collection, use and disclosure of their children's names, addresses or other personally identifiable information.

INFORMATION FROM OK ABOUT CHILDREN

Article #14

Markcters should take into account rhc age range, knowledge, sophistication and maturity of children when collecting informarion from them. Markcters should limit the collection, use and dissemination of information collected from or about children to information required for the promotion, sale and delivery of goods and services, provision of customer services, conducting market research and engaging iii orher appropriarc marketing activities.

Marketers should effectively explain that the information is being requested for marketing purposes. Information not appropriate for marketing purposes should not be collected.

Upon request from a parenr, markercrs should promptly provide the source and general nature of information maintained abour a child. Marketers should implement strict security measures to ensure against unauthorized access, alteration or disseminarion of rhe data collected from or about children.

MARKETING ONLINE TO CHILDREN UNDER 13 YEARS OF AGE

Article #15

Markcrers should nor collect personally identifiable informarion onlinc from a child under 13 wirhour prior parenral consent or direct parenral notification of the nature and intended use of such informarion onlinc and an opportunity for the parent to prevenr such use and participation in rhc activity. Online contact informarion should only he used to directly respond to an activity initiated by a child and nor to recontact a child for orher purposes without prior parental conscnr. However, a marketer may contact and gcr information from a child for the purpose of obtaining parental consent.

Markcrcrs should not collect, without prior parental consent, personally identifiable information online from children that would permit any off-line contact with the child.

Markcters should not distribute to rhird parties, wirhout prior parental conscnr, information collected from a child that would permit any contact wirh thai child.

Marketers should take reasonable steps to prevent the online publication or posting of information that would allow a rhird parry to contact a child off-line unless the marketer has prior parental consent.

Marketers should not entice a child to divulge personally identifiable informarion by rhc prospect of a special game, prize or oilier offer.

Markerera should nor make a child's access to a Web sire contingent on the collection of personally identifiable information. Only online contact informarion used to enhance the interactivity of rhe site is permitted.

The following assumptions underlie rhese onlinc guidelines:

- When a marketer direcrs a sire at a cerraiii age group, it can expect rhar rhe visitors to rhar airc are in rhar age range; and
- When a markerer asks rhe age of the child, the markerer can assume rhc answer to be truthful.

Special Offers and Claims

USE OF THE WORD "FREE" AND OTHER SIMILAR REPRESENTATIONS

Article #16

A producr or service that is offered without cosr or obligation to the recipient may he unqualifiedly described as "free."

If a product or service is offered as "Free," all qualifications and condirionn should be clearly and conspicuously disclosed, in close conjunction wirh the use of rlie term "free" or orher similar phrase. When the term "free" or other similar representations are made (for example, 2-for-1, half-price or 1-cent offers), rlic product or service required to be pili-chased should not have been increased in price or decreased in quality or quantity.

PRICE COMPARISONS

Article #17

Price comparisons including those between a marketer's current price and a former, future or suggested price, or between a marketer's price and the price of a competitor's comparable product should be fair and accurate

In each case of comparison to a former, manufacturer's suggesred *or* comperitor's comparablc prodtict price, recent substantial sales should have been made ar that pricc in the same trade area.

For comparisons with a future price, rherc should be a reasonable expectation that the new pricc will be charged in rlie foreseeable future.

GUARANTEES

Article #18

If a product or service is offered with a guarantee or a warranty, either the terms and conditions should be set forrh in full in the promorion, or rhc promotion should state how the consumer may obrain a copy. The guaranree should clearly state rhe name and address of the guarantor and the duration of the guarantee.

Any requests for repair, replacement or refund under rhc terms of a guarantee or warranty should be honorcd promprly. In an unqualified offer of refund, repair or replacement, the customer's preference should prevail.

USE OF TEST OR SURVEY DATA

Article #19

All test or survey data referred to in advertising should bc valid and reliable as to source and methodology, and should support the specific claim for which it is cited. Advertising claims should not disrorr test or survey results or take them out of context.

TESTIMONIALS AND ENDORSEMENTS

Article #20

Testimonials and endorsements should hc used only if rhcy are:

a. Authorized by the person quoted;
b Genuine and related ro the experience of the perron giving them both ar the time made and at rhc time of the promotion; and
c. Nor taken out of conrext so as io distort rlie endorser's opinion or experience with the product.

Sweepstakes

USE OF THE TERM "SWEEPSTAKES"

Article #21

Sweepstakes are promotional devices by which items of value (prizes) are awarded to parricipanrs by chance withour rhc promorer's requiring the participants to render something of value (considrrarion) to be eligible to participate. The co-exisrence of all three elements - prize, chance and considerarion — in the same promorion consritutes a lottery. It is illegal for any private enrerprise to run a lottery without specific governmental authorization.

When skill replaces chance, the promorion becomes a skill contest. When gifts (premiums or orher items of valuc) are given to all parricipants independent of the element of chance, rhe promotion is nor a sweepstakes. Promotions rhar are not sweepstakes should not be hcld our as such.

Only those prornorional devices rhar satisfy the definition stated above should be called or held our ro be a sweepsrakes.

NO PURCHASE OPTION

Article #22

Promotions should clearly state that no purchase is required to win sweepstakes prizes. They should not represent that those who make a purchase or otherwise render consideration with rlicir enrry will have a better chance of winning or will lie eligible to win more or larger prizes than those who do not make a purchase or otherwise render consideration. The method for entering without ordering should be easy to find, read and understand. When response devices used only for entering rhc sweepstakes are provided, they should be as easy ro find as those utilized for ordering the product or service.

CHANCES OF WINNING

Article #23

No sweepstakes promotion, or any of its parts, should represent rhar a recipicnr or entrant has wori a prize or that any enrry stands a greater chance of winning a prize than any other cnrry when this is not rhe case. Winners should be selected in a manner that ensures fair application of the laws of chance.

PRIZES

Article #24

Sweepsrakes prizes should be adverriacd in a manner rhar is clear, honest and cornplere so rhac rhe consumer may know rhe exact nature of whar is being offered. For prizes paid over time, the annual payment schedule and number of years should be clearly disclosed.

Photographs, illustrations, artwork and the situations rhey represenr should be accurate portrayals of the prizes listed in rhc promotion.

No award or prize should be held forrh dirccrly or by implication as having substantial monetary value if it is of nominal worth. The value of a non-cash prize should be stated at regular retail value, whether actual cost to rhr sponsor is greater or less.

All prizes should be awarded and delivered without cost to rlic participant. If there are certain conditions under which a prize or prizes will iior be awarded, that fact should be disclosed in a manner that is easy io find, read and understand.

PREMIUMS

Article #25

Premiums should bc advertised in a manner that is clear, honest and complete so that the consumer may know the cxacr nature of what is being offered

A premium, gifr or item should iior bc called or held out to be a "prize" if it is offered to every recipient of or participant in a promotion. If all participants will receive a premium, gifr or item, thar fact should he clearly disclosed.

DISCLOSURE OF RULES

Article #26

All terms and conditioris of the sweepstakes, including enrry procedures and rules, should be easy to find, read and understand. Disclosures set our in the rules section concerning no purchase option, prizes and chances of winning should not contradict the overall impression created by rhe promotion.

The following should be set Forth clearly in the rules:

- No purchase of the advertised producr or service is required in order to win a prize.
- A purchase will nor improve the chances of winning.
- Procedures for entry.
- If applicable, disclosure that a facsimile of the entry blank or orhcr alternate means (such as a 3"x 5" card) may be used to enter the sweepstakes.
- The termination date for eligibility in the sweepsrakes. The termination darc should specify wherher it is a dare of mailing or receipt of entry deadline.

- The number, retail value (of non-cash prizes) and complete description of all prizes offered, and whether cash may be awarded instead of merchandise. If a cash prize is to be awarded by installment payments, that fact should be clearly disclosed, along with the nature and timing of the payments.
- The estimated odds of winning each prize. If the odds depend upon the number of entries, the stated odds should be based on an estimate of the number of entries.
- The method by which winners will be selected.
- The geographic area covered by the sweepstakes and those areas in which the offer is void.
- All eligibility requirements, if any.
- Approximate dates when winners will be selected and notified.
- Publicity rights regarding the use of winner's name.
- Taxes are the responsibility of the winner.
- Provision of a mailing address to allow consumers to receive a list of winners of prizes over $25.00 in value.

Fulfillment

UNORDERED MERCHANDISE

Article #27

Merchandise should not be shipped withour having first received the customer's permission. The exceptions are samples or gifts clearly marked as such. and merchandise mailed by a charirahle organization soliciting contributions, as long as all items are senr with a clear and conspicuous statement informing rhe recipienr of an unqualified right to treat the product as a gift and to do wirh it as rtie rccipirnr sees fit, at no cost or obligation to the recipient.

PRODUCT AVAILABILITY AND SHIPMENT

Article #28

Dirccr marketers should offer merchandise only when it is on hand or when rhcrc is a reasonable expectation of its timely rcceipr.

Direct marketers should ship all orders according io the terms of the offer or within 30 days wlicrc there is no promised shipping date, unless otherwise directed by ihe consumer, and should promptly notify consumers of any delays.

DRY TESTING

Article #29

Direct marketers should engage in dry testing only when the special iiarurc of rhe offer is made clear in the promorion

Collection, Use and Maintenance of Marketing Data

COLLECTION, USE AND TRANSFER OF PERSONALLY IDENTIFIABLE DATA

Article #30

Consumers who provide data that may be rented, sold or exchanged for markcring purposes should bc informed periodically by marketers of rheir policy concerning rhe rental, sale or exchange of such data and of rhc opportunity to opt our of the markering process. Should rhar policy substantially change, markciers have an obligation to inform consumers of rhar change prior to the rental, sale or exchange of such data, and to offer consumers an opportunity to opr our of rhe markering process at that rime. All individual opt-out requests should be honored. Markererr should maintain and use rlicir own systems, policies and procedures, including in-house suppression and opr-out lists, and at no cost to consumers refrain from using or transferring such data, as the case may bc, as requested by consumers.

List compilers should maintain and use their own systems, policies and procedures, and at no cost to consumers refrain from using or transferring data, as the case may be, as requested by consumers.

For each list that is rented, sold or exchanged, the applicable DMA Preference Service name removal list (e.g., Mail Preference Service, Telephone Preference Service and E-mail Preference Service) should be employed prior to use.

Data about consumers who have opted out of use, including a request not to be contacted, or transfer should not, per their requests, be used, rented, sold or exchanged.

Upon request by a consumer, marketers should disclose the source from which they obtained personally identifiable data about that consumer.

PERSONAL DATA

Article #31

Marketers should be sensitive to the issue of consumer privacy and should only collect, combine, rent, sell, exchange or use marketing data. Marketing data should be used only for marketing purposes.

Data and selection criteria that by reasonable standards may be considered sensitive and/or intimate should not be disclosed, displayed or provide the basis for lists made available for rental, sale or exchange when there is a reasonable expectation by the consumer that the information will be kept confidential.

Credit card numbers, checking account numbers and debit account numbers are considered to be personal information and therefore should not be transferred, rented, sold or exchanged when there is a reasonable expectation by the consumer that the information will be kept confidential. Because of the confidential nature of such personally identifying numbers, they should not be publicly displayed on direct marketing promotions or otherwise made public by direct marketers.

Social Security numbers are also considered to be personal information and therefore should not be transferred, rented, sold or exchanged for use by a third party when there is a reasonable expectation by the consumer that the information will be kept confidential. Because of the confidential nature of Social Security numbers, they should not be publicly displayed on direct marketing promotions or otherwise made public by direct marketers. Social Security numbers, however, are used by direct marketers as part of the process of extending credit to consumers or for matching or verification purposes.

COLLECTION, USE AND TRANSFER OF HEALTH-RELATED DATA

Article #32

Health-related data constitute information related to consumers':

- Illnesses or conditions;
- Treatments for those illnesses or conditions, such as prescription drugs, medical procedures, devices or supplies; or
- Treatments received from doctors (or other health care providers), at hospitals, at clinics or at other medical treatment facilities.

These fair information practices and principles apply to any individual or entity that collects, maintains, uses and/or transfers health-related data for marketing purposes, whether or not marketing is a primary purpose. These principles are applicable to nonprofit as well as for-profit entities.

1) Personally identifiable health-related data gained in the context of a relationship between consumers and health or medical care providers or medical treatment facilities should not be transferred for marketing purposes without the specific prior consent of those consumers. Health or medical care providers include licensed health care practitioners, such as doctors, nurses, psychologists, pharmacists and counselors, and those who

support health care providers and therefore have access to personally identifiable information, such as insurance companies, pharmacy benefits managers or other business partners, and businesses that sell prescription drugs.

2) Personally identifiable health-related data, including the occurrence of childbirth, gained in the context of a relationship between consumers and health or medical care providers or medical treatment facilities (as defined in 1) should not be used to contact those consumers for marketing purposes without giving consumers a clear notice of the marketer's intended uses of the data and the opportunity to request not to be so contacted.

3) Personally identifiable health-related data volunteered by consumers, and gathered outside of the relationship between consumers and healrh care providers, should also be considered sensitive and personal in nature. Such data should not be collected, maintained, used and/or transferred for marketing purposes unless those consumers receive, at the time the data are collected, a clear notice of rhe marketer's intended uses of the data, whether the marketer will transfer the data to third parties for further use, the name of the collecting organization, and the opportunity to opt out of transfer of the data. Such data include, but are not limited to, data volunteered by consumers when responding to surveys and questionnaires. Clear notice should be easy to find, read and understand.

4) Personally identifiable health-related data inferred about consumers, and gathered outside of the relationship between consumers and health care providers, should also be considered sensitive and personal in nature. These are data based on consumers' purchasing behavior. Such data include, but are not limited to, data captured by inquiries, donations, purchases, frequent shopper programs, advertised toll-free telephone numbers, or other consumer response devices. Any entity, including a seller of over-the-counter drugs, which uses inferred health-related data should. per The DMA's Privacy Promise, promptly provide notice arid the opportunity to opt out of any transfer of the data for marketing purposes.

5) Marketers using personally identifiable health-related data should provide both the source and rhr nature of the informarion rhcy have about that consumer, upon request of that consumer and receipr of that consumer's proper idenrificarion.

6) Consumers should not be required to release personally identifiable health-related information about themselves to be used for markcring purposes as a condirion of receiving insurance coverage, treatment or information, or otherwise completing rhcir health care-related transaction

7) The text, appearance and narure of solicitations direcred to consumers on the basis of health-related dara should take into account rhc sensitive narure of auch dara.

8) Marketers should ensure that safeguards are built into their systems to protect personally identifiable health-related darn from unauthorized access, alteration, abuse, theft or misappropriation. Employees who have access to personally identifiable health-relared data should agree in advance to use those data only in an authorized manner.

If personally identifiable health-related dara are transferred from one direcr marketer to dnorher for a marketing purpose, rhe rransferor should arrange strict security measures to assure chat unauthorized access ro rhc data is iior likely during rhc rransfer process. Transfers of personally identifiable healrh-relared data should nor he permirred for any marketing uses that nre in violarion of any of The DMA's Guidelines for Erhical Business Practice.

Nothing in these guidelines is meant to prohibit research. marketing or other uses of health-related data which are not personally identifiable, and which are used in the aggregate.

PROMOTION OF MARKETING LISTS

Article #33

Any advertising or promotion for marketing lists being offered for rental, sale or exchange should reflect the fact that a marketing list is an aggregate collection of marketing data. Such promotions should also reflect a sensitivity for the consumers on those lists.

MARKETING LIST USAGE

Article #34

List owners, brokers, managers, compilers and users of marketing lists should ascertain the nature of the list's intended usage for each materially different marketing use prior to rental, sale, exchange, transfer or use of the list. List owners, brokers, managers and compilers should not permit the rental, sale, exchange or transfer of their marketing lists, nor should users use any marketing lists for an offer that is in violation of these guidelines.

Online Marketing

ONLINE INFORMATION

Article #35

Notice to Online Visitors

If your organization operates an online site, you should make your information practices available to visitors in a prominent place on your Web site's home page or in a place that is easily accessible from the home page. The notice about information practices on your Web site should be easy to find, read, and understand so that a visitor is able to comprehend the scope of the notice. The notice should be available prior to or at the time personally identifiable information is collected.

Your organization and its postal address, and the Web site(s) to which the notice applies should be identified so the visitor knows who is responsible for the Web site. You also should provide specific contact information so the visitor can contact your organization for service or information.

If your organization collects personally identifiable information from visitors, your notice should include:

- The nature of personally identifiable information collected about individual visitors online, and the types of uses you make of such information, including marketing uses that you may make of that information.
- Whether you transfer personally identifiable information to third parties for use by them for their own marketing and the mechanism by which the visitor can exercise choice not to have such information transferred.
- Whether personally identifiable information is collected by, used by or transferred to agents (entities working on your behalf) as part of the business activities related to the visitor's actions on the site, including to fulfill orders or to provide information or requested services.
- Whether you use cookies or other passive means of data collection, and whether such data collected are for internal purposes or transferred to third parties for marketing purposes.
- What procedures your organization has put in place for accountability and enforcement purposes.
- That your organization keeps personally identifiable information secure.

If you knowingly permit network advertisers to collect information on their own behalf or on behalf of their clients on your Web site, you should also provide notice of the network advertisers that collect information from your site and a mechanism by which a visitor can find those network advertisers to obtain their privacy statements and to exercise the choice of not having such information collected. (Network advertisers are third parties that attempt to target online advertising and make it more relevant to visitors based on Web traffic information collected over time across Web sites of others.)

If your organization's policy changes materially with respect to the sharing of personally identifiable information with third parties for marketing purposes, you will update your policy and give consumers conspicuous notice to that effect, offering an opportunity to opt out.

Honoring Choice

You should honor a visitor's choice regarding use and transfer of personally identifiable information made in accordance with your stated policy. If you have promised to honor the visitor's choice for a specific time period, and if that time period subsequently expires, then you should provide that visitor with a new notice and choice. You should provide choices of opting out online. You may also offer opt-out options by mail or telephone.

Providing Access

You should honor any representations made in your online policy notice regarding access.

Data Security

Your organization should use security technologies and methods to guard against unauthorized access, alteration, or dissemination of personally identifiable information during transfer and storage. Your procedures should require that employees and agents of your organization who have access to personally identifiable information use and disclose that information only in a lawful and authorized manner.

Visitors Under 13 Years of Age

If your organization has a site directed to children under the age of 13 or collects personally identifiable information from visitors known to be under 13 years of age, your Web site should take the additional steps required by Article #15 of these guidelines and inform visitors that your disclosures and practices are subject to compliance with the Children's Online Privacy Protection Act.

Accountability

There should be a meaningful, timely, and effective procedure through which your organization can demonstrate adherence to your stated online information practices. Such a procedure may include: 1) self or third party verification and monitoring, 2) complaint resolution and 3) education and outreach. This can be accomplished by an independent auditor, public self-certification, a third party privacy seal program, a licensing program, membership in a trade, professional or other membership association or self-regulatory program, or being subject to government regulation.

COMMERCIAL SOLICITATIONS ONLINE

Article #36

Marketers may send commercial solicitations online under the following circumstances:

- The solicitations are sent to the marketers' own customers, or
- Individuals have given their affirmative consent to the marketer to receive solicitations online, or
- Individuals did not opt out after the marketer has given notice of the opportunity to opt out from solicitations online, or
- The marketer has received assurance from the third party list provider that the individuals whose e-mail addresses appear on that list:
  - have already provided affirmative consent to receive solicitations online, or
  - have already received notice of the opportunity to have their e-mail addresses removed and have not opted out.

In each solicitation sent online, marketers should furnish individuals with a link or notice they can use to:

- request that the marketer not send them future solicitations online, and
- request that the marketer not rent, sell, or exchange their e-mail addresses for online solicitation purposes.

The above requests should be honored in a timely manner.

Only those marketers that rent, sell, or exchange information need to provide notice of a mechanism to opt out of information transfer to third-party marketers.

Marketers should process commercial e-mail lists obtained from third parties using The DMA's E-mail Preference Service suppression file. E-MPS need not be used on one's own customer lists, or when individuals have given affirmative consent to the marketer directly.

Solicitations sent online should disclose the marketer's identity, and the subject line should be clear, honest, and not misleading. A marketer should also provide specific contact information at which the individual can obtain service or information. The marketer's street address should be made available in the e-mail solicitation or by a link to the marketer's Web site.

Telephone Marketing

REASONABLE HOURS

Article #37

Telephone contacts should be made during reasonable hours as specified by federal and state laws and regulations.

TAPING OF CONVERSATIONS

Article #38

Taping of telephone conversations by telephone marketers should only be conducted with notice to or consent of all parties, or the use of a beeping device, as required by applicable federal and state laws and regulations.

RESTRICTED CONTACTS

Article #39

A telephone marketer should iior knowingly call a consumer who has an unlisted or unpublished telephone number, or a telephone number for which the called party must pay the charges, except in instances where tlic number was provided by the consumer to that marketer.

Random dialing techniques, whether manual or automated, in which those parties to be called are left to chance should nor he used in sales and markcring solicitations.

Sequential dialing techniques, whether a manual or automated process, in which selection of those parties to hc called is basrd on the location of their telephone numbers iii a sequence of telephone numbers should nor hc used.

Telephone marketers using automatic number identification (ANI) should not rent, sell, transfer or exchange, wirhour customer consent, telephone numbers gained from ANI except where a prior business relationship exists for the sale of directly related goods or services

USE OF AUTOMATED DIALING EQUIPMENT

Article #40

When using automated dialing equipmenr for any reason, telephone markercrs should only use equipment that allows rhc telephone to immediately release the line when rhe called party terminates the connection.

ADRMPS (Automatic Dialers and Recorded Message Players) and prerecorded messages should be used only in accordance with tariffs, federal, state, and local laws, FCC regulations and these guidelines. Telephone marketers should use a live operator to obtain a consumer's permission before delivering a recorded message

When using any automated dialing equipment to reach a multi-line location, the equipment should release each line used before connecting to another.

USE OF PREDICTIVE AUTO DIALING EQUIPMENT

Article #41

Repeated abandoned "hang up" calls by individual marketers to consumers' residential telephone numbers are seen as offensive by consumers and should be eliminated.

Marketers who use predictive auto dialing equipment to contact consumers' residences, and those on whose behalf those contacts are made, should:

Set a company-wide standard that requires that every effort is made to have a live operator converse promptly with the consumer who answers the telephone. Abandoned or "hang up" calls should be kept as close to 0% as possible, and in no case should exceed 5% of answered calls per day in any campaign.

If a live operator is unavailable to take any call generated by the dialer, abandon the call and release the line after not more than two seconds.

Not abandon the same telephone number more than twice within a 48 hour time period and not more than twice within a 30-day period of a marketing campaign.

If further calls are placed to a telephone number that has been either abandoned by the marketer twice in the same month of a marketing campaign, or twice during the past 48 hours for any marketing campaign, then any additional calls must be connected promptly to a live operator.

Not knowingly call anyone who has an unlisted or unpublished telephone number unless calling an existing customer or in support of an existing marketer-customer relationship, and not knowingly call anyone who is on the marketer's do-not-call list.

Use The DMA's Telephone Preference Service name-removal list prior to using any outbound calling list of prospects (not existing customers).

Allow the predictive dialing system to ring at least four times or for 12 seconds before disconnecting.

Companies that manufacture and/or sell predictive auto dialing equipment should:

Design the software with the goal of minimizing "hang up" calls to consumers. The software should be delivered to the user set as close to 0% as possible.

Distribute these *Guidelines for Users of Predictive Auto Dialing Equipment* to purchasers of predictive dialing equipment and recommend that they be followed.

The predictive dialing equipment's software should include reporting capability that would 1) allow prospective buyers to compare products, and 2) permit the user of the equipment to substantiate the manner in which the equipment is used. At a minimum, the software should be capable of providing the following information:

calls attempted — numbers
calls answered — numbers and percentage
calls connected – numbers and percentage
calls passed to agent — numbers and percentage
calls capturing previous do-not-call requests

Glossary of Terms Used

- Predictive Auto Dialing Equipment – any system or device that initiates outgoing call attempts from a predetermined list of phone numbers, based on a computerized pacing algorithm.
- Abandoned Call – a call placed by a predictive dialer to a consumer, which, when answered by the consumer, breaks the connection because no live agent is available to speak to the consumer.

- Abandon Rate – the percentage of leads that are brought up by the dialer, which are not then transferred to a live operator (does not include calls to answering machines).
- Answered Calls – calls which are answered by a live consumer (not an answering machine).
- Marketing Campaign – a marketing effort carried out by marketers to consumers, or by service agents on behalf of marketers, during a specific time period, and in which a list of prospective customers is used to sell the same products or services.
- Report – reportable information that should be made available which contains key points, including the percentage of abandoned calls, call attempts, call delays and other statistics.

USE OF TELEPHONE FACSIMILE MACHINES

Article #42

Unless there is a prior business relationship with the recipient, or unless the recipient has given prior permission, unsolicited advertisements should not be transmitted by facsimile. Each permitted transmission to a fax machine must clearly contain on each page or on the first page, the date and time the transmission is sent, the identity of the sender and the telephone number of the sender or the sending machine.

PROMOTIONS FOR RESPONSE BY TOLL-FREE AND PAY-PER-CALL NUMBERS

Article #43

Promotions for response by 800 or other toll-free numbers should be used only when there is no charge to the consumer for the call itself and when there is no transfer from a toll-free number to a pay call.

Promotions for response by using 900 numbers or any other type of pay-per-call programs should clearly and conspicuously disclose all charges for the call. A preamble at the beginning of the 900 or other pay-per-call should include the nature of the service or program, charge per minute and the total estimated charge for the call, as well as the name, address and telephone number of the sponsor. The caller should be given the option to disconnect the call at any time during the preamble without incurring any charge. The 900 number or other pay-per-call should only use equipment that ceases accumulating time and charges immediately upon disconnection by the caller.

DISCLOSURE AND TACTICS

Article #44

Prior to asking consumers for payment authorization, telephone marketers should disclose the cost of the merchandise or service and all terms and conditions, including payment plans, whether or not there is a no refund or a no cancellation policy in place, limitations, and the amount or existence of any extra charges such as shipping and handling and insurance. At no time should high pressure tactics be utilized.

Fund-Raising

Article #45

In addition to compliance with these guidelines, fund-raisers and other charitable solicitors should, whenever requested by donors or potential donors, provide financial information regarding use of funds.

Laws, Codes, and Regulations

Article #46

Direct marketers should operate in accordance with laws and regulations of the United States Postal Service, the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board, and other applicable federal, state and local laws governing advertising, marketing practices and the transaction of business

Other DMA Resources

Do the Right Thing Compliance Guide
Privacy Promise to Consumers Member Compliance Guide
Mailing List Practices Guidance
Screening Advertisements: Guide for the Media
Mail Preference Service, Telephone Preference Service and E-mail Preference Service Subscriber Brochures
A Business Checklist for Direct Marketers
Recommended Practices for Customer Service
Do's and Don'ts — Sweepstakes for Marketers

The DMA can also provide your company with information on the following Federal Trade Commission (FTC) and Federal Communications Commission (FCC) regulations and rules affecting direct marketers:

FTC:
Mail or Telephone Order Merchandise Rule
Telemarketing Sales Rule
Children's Online Privacy Protection Rule
Negative Option Rule
Guides Against Deceptive Pricing
Guarantees and Warranties
Equal Credit Opportunity Act
Fair Debt Collection Practices Act
Telephone Disclosure and Dispute Resolution Act

FCC:
Telephone Consumer Protection Act

The U.S. Postal Service's *Fighting Mail Order Fraud and Theft: Best Practices for the Mail Order Industry Reference Guide* is available, as well as other DMA and government titles, and a variety of consumer education brochures. Contact the Ethics and Consumer Affairs Department in Washington, D.C. for more information.

The DMA Ethics nnd Consumer Affairs Department

In its continuing efforts to improve the practices of direct marketing and the marketer's relationship with customers, The DMA sponsors several activities in its Ethics and Consumer Affairs Department.

- Ethical guidelines arc maintained, updated periodically, and distributed to clic direcr marketing industry.
- The Committee on Ethical Business Practice investigates and examines practices arid promotions made rhrougliour the direcr marketing field which are brought to its attention.
- The Ethics Policy Committee revises the guidelines as needed, and initiates programs and projects directed toward improved ethical awareness in the direct marketing area.
- "Dialogue" nicerings between direcr marketing professionals and consumer affairs and regulatory representatives facilirate increased communication between the industry and its customers.
- MPS (Mail Prefcrcncc Service) offers consumers assistance in decreasing the volume of national advertising mail they receive at home. TPS (Telephone Preference Service) offers a decrease in national telephone sales calls reccivrd at home. E-MPS (E-mail Preference Service) offers a reduction in unsolicited commercial e-mails.

For additional informarion contact The DMA's Washington, D.C. office.

1111 19th Street, NW, Suirc 1100
Washington, D.C. 20036-3603
Phone: 202.955.5030
Fax: 202.955.0085
E-mail: ethics@the-dma.org
www.the-dma.org
www.dmaconsumers.org

Direct Markcring Association, Inc.
Headquarters:
1120 Avenue of the Americas
New York, New York 10036-6700
212.768.7277
Fax: 212.302.6714
www.the-dma.org

•

Washington, D.C. office:
1111 19th Street, NW, Suite 1100
Washingron, D.C. 20036-3603
202.955.5030
Fax: 202.955.0085
www.thc-dma.org

Revised April 2002

Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

COMMENTS OF THE

DIRECT MARKETING ASSOCIATION, INC.

AND THE

U.S. CHAMBER OF COMMERCE

TELEMARKETING RULEMAKING COMMENT
FTC File No. R411001

(Proposed Amendments to the Telemarketing Sales Rule)

H. Robert Wientzen
President & CEO
Gerald Cerasale
Senior Vice President, Government Affairs
Direct Marketing Association, Inc.
1111 19th Street, N.W., Suite 1100
Washington, D.C. 20036
202/955-5030

R. Bruce Josten
Executive Vice President, Government Affairs
U.S. Chamber of Commerce
1615 H Street, N.W.
Washington, D.C. 20062
2021659-6000

Counsel:
Ronald L. Plesser
James J. Halpert
Stuart P. Ingis
Paul W. Jamieson
Alan R. Lewine
Piper Rudnick LLP
1200 19th Street, N.W.
Washington, D.C. 20036
202/861-3900

April 15, 2002

The Commission's stated intention is to "enable consumers to contact one centralized registry to effectuate their desire not to receive telemarketing calls." 67 Fed. Reg. at 4516. The Commission does not have the authority to preempt state law and create one list that would incorporate all state lists." The Telemarketing Act does not contemplate Commission preemption of state lists with the creation of a national do-not-call list.[14] The DMA, using its TPS, is not limited by the Telemarketing Act. The DMA could create such a "one stop" list and could **work** with the Commission and the states to adapt the TPS to a central clearinghouse, to which a business could go to scrub its list against the DMA list and all state lists.

If, in fact, the Commission does determine that it has preemptive authority, it should preempt state laws as they apply to interstate phone calls. With preemption, a telemarketer would then be subject to the national list and the law of the state from where the telemarketing call is initiated for calls to individuals in that state (purely intrastate calls). Compliance with two legally required lists would be significantly more predictable to businesses than compliance with **52** lists.

D. The *NPRM* Exceeds the Commission's Statutory Authority

In the NPRM's proposal for a national call registry, the Commission quickly departs from its recognition ***of*** the fact that the "jurisdictional reach of the Rule is set by statute, and the Commission has no authority to expand the Rule beyond those statutory limits." 67 Fed. Reg. at 4497. The Commission proposes a national do-not-call list to regulate "abusive" practices based on the Telemarketing Act's instruction to prohibit "telemarketers from undertaking a 'pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of

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[13] **15** U.S.C. § 6103(f)(1)

[14] **We** note that Congress considered preemption of state do-not-call lists in the context of the TCPA and directed *the FCC* that **if** the FCC required the establishment of a **single** national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority **may** not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the pan of such single national database that relates **to** such state. 47 U.S.C.§ 227(e)(2).

such consumer's right to privacy."' *Id.* at 4518, *citing* 15 U.S.C. § 6102(a)(3)(A). From this statutory text, the Commission justifies its proposal to severely limit *all* telemarketing—including legitimate activities—as "promot[ing] the [Telemarketing Act]'s privacy protections." As demonstrated below, the proposed national list represents a dramatic and impermissible expansion of the Commission's limited jurisdiction over deceptive and abusive telemarketing practices and ignores Congress' intent that any regulations balance the interest in not burdening legitimate telemarketing.[15]

1. The Telemarketing Act Does Not Aulhorize the Creation of a National Do-Not-Call List or Registry

The Telemarketing Act authorizes the Commission to promulgate rules to "prohibit[] deceptive telemarketing acts or practices and other abusive telemarketing acts or practices," and then instructs the Commission to include a definition of deceptive telemarketing. 15 U.S.C. § 6102(a)(1), (2). Under Commission jurisprudence, deception occurs "*if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third,* ***the*** *representation, omission, or practice* ***is*** *material."* 67 Fed. Reg. at 4503, *citing Cliffdale Associates,* 103 F.T.C. 110, 165 (emphasis added). We note for the record that the legitimate telemarketing activities necessarily encompassed within the national registry are not within the Commission's jurisdiction over deceptive practices because they lack the second element of deception (to mislead). Accordingly, the Commission does not have the authority to justify (nor does it attempt to justify it in the NPRM) the creation of a national do-not-call list on the basis of the jurisdiction it was granted in the Telemarketing Act to regulate "deceptive" telemarketing acts or practices.

The Telemarketing Act further instructs the Commission to define "other abusive telemarketing acts or practices." The Telemarketing Act specifies that the Commission's rules to

[15] "An agency has the power to resolve a dispute or an issue ***only*** if Congress has conferred on the agency statutory jurisdiction to do so." Richard J. Pierce Jr., *Administrative Law Treatise*, Section 14.2 (4th Ed. 2002) at 935.

prevent abusive telemarketing acts or practices should include: (a) a prohibition of a "pattern of unsolicited telephone calls"; (b) restrictions on the hours of the day and night when unsolicited telephone calls can be made to the consumers; and **(c)** a requirement of prompt disclosure by telemarketers. 15 U.S.C. § 6102(a)(3). Neither the statute nor the legislative history mentions do-not-call lists, lei alone a national registry.

Neither the term "abusive" nor the term "pattern" is defined in the Telemarketing Act. However, according to its plain meaning,[16] a "pattern" cannot consist of one call to represent a prohibited practice under Section 6102(a)(3). Nor can the Commission plausibly argue that *all* telemarketing swept in by a national database reasonably can be interpreted as "abusive," which, as noted in the NPRM, commonly means "wrongly used," "perverted," and "misapplied."" Therefore, purely as a matter of statutory construction, there is nothing to authorize the Commission to limit or prevent through a national do-not-call list ***one*** non-deceptive telephone call that is made within the hours set by the Commission and that is accompanied by the requisite disclosures.

However, that is precisely what the Commission's national do-not-call registry aims to do: limit legitimate, non-abusive telemarketing calls made according to the Commission's rules. The Commission's reasoning appears to exclusively lie in its conclusion that because each of the three enumerated examples in the statute "implicates consumers' privacy," 67 Fed. Reg. at **45**10, Congress intended to grant the Commission authority to "reign in" any non-deceptive business practices that "impinge" on consumers' right to privacy. *Id.* at **451**1. While the statutory examples demonstrate that Congress intended to grant authority to regulate egregious telemarketing practices (such as a pattern of several calls made late at night or calls that are abusive), the proposed national do-not-call registry encompasses legitimate telemarketing firms and practices within its scope, irrespective of whether they meet any reasonable definition of an

[16] In fact, the legislative history clarifies that this statutory reference to a "pattern" **was not** intended to address "a pattern or practice of telemarketing, per se." House Report at 9.

"abusive" practice. The Commission should not use a very attenuated consumer privacy interest to bootstrap the focused jurisdiction Congress granted it over "abusive" practices to support a national registry limiting non-abusive, legitimate activities.

2. *The Legislative History of the Telemarketing Act Does Not Support the Commission*

There is nothing in the legislative history of the Telemarketing Act to justify that telemarketing calls are abusive or that a national do-not-call list would address deception or abusive practices. Clearly there is no basis to indicate that Congress thought a do-not-call list was necessary to limit deceptive practices. Moreover, the legislative history leaves no doubt that the Commission's proposed national do-not-call list curtails activities that Congress instructed should not be included within the scope of "abusive" practices under the Telemarketing Act. Specifically, Congress explained that "[i]n directing the Commission to prescribe rules prohibiting abusive telemarketing activities, it is ***not*** the intent of the Committee that telemarketing practices be considered ***per se*** 'abusive."' H.R. Rep. No. 103-20, at 4 (1993), ***reprinted in*** 1993 U.S.C.C.A.N. 1626, 1629 ("House Report") (emphasis added).[18] Indeed, in a passage cited in the NPRM, the House Report goes on to list the kinds of activities that would be considered abusive: threats or intimidation; obscene or profane language, "continuous or repeated" calling, or "engagement of the called party in conversation with an intent to annoy, harass, or oppress." House Report at 8, ***cited*** at 67 Fed. Reg. 4511 n.174. With respect to the "pattern of unsolicited telephone calls'' reference in 15 U.S.C. § 6102(a)(3), the House Report clarifies that "the phrase 'a pattern or practice of telemarketing' in . . . the bill refers only to a pattern or practice of telemarketing activities that violate the Commission's rules . . . not to a pattern or practice of telemarketing, per se. The Committee does not intend to limit legitimate telemarketing practices." House Report at 9.

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[17] 67 Fed. Reg. at 4511 n.176, *citing* Webster's International Dictionary, Unabridged, 1949

[18] This concern that the Commission's rules not limit "legitimate telemarketing practices" is repeated subsequently in the House Report. House Report at 9.

According to the Commission, its proposal for a national do-not-call registry "directly advances the Telemarketing Act's goal to protect consumers' privacy" and thus is within the scope of the Commission's jurisdiction. 67 Fed. Reg. at 4517. The Commission also appears to base its proposal on the fact that surveys show that *some* consumers consider telemarketing calls to be "intrusive" and "annoying." *Id.* at 4518.[19] But as the cited passages from the legislative history illustrate, Congress did not grant the Commission authority to adopt *any* measure that the Commission believes advances a privacy interest or that combats a perceived annoying business practice among some concerns. Rather, Congress intended to strike an "equitable balance between the interest of stopping deceptive . . . and abusive telemarketing activities and not unduly burdening legitimate businesses," House Report at 2. The national do-not-call database does not balance these interests because it sweeps in all legitimate, non-deceptive, non-abusive telemarketing practices within its parameters.

3. *If Congress Had Intended to Grant the FTC Authority to Establish a National Do-Not-Call List, It Would Have Done So Explicitly in the Telemarketing Act*

There is no reference to a do-not-call list—let alone a national registry—in either the statutory text or the legislative history of the Telemarketing Act. However, the TCPA demonstrates that where Congress wanted an agency to consider such a mechanism, it did so in a statute. Specifically, the TCPA authorized the FCC to conduct a rulemaking proceeding in which it was to consider a number of measures to protect residential telephone subscriber rights in an "efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers."[20] According to the statute, these regulations could "require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that

[19] Nowhere in the Commission's proposal is there any factual evidence that the rate of complaints has increased since the FTC's 1995 proceeding on this issue, or any other factual evidence describing what has changed since 1995 that justifies a national do-not-call list. Likewise, the Commission does not make the case that company-specific do-not-call lists do not work.

[20] 47 U.S.C. § 227(c)(2).

compiled list and parts thereof available for purchase." 47 U.S.C. § 227(c)(3). Congress proceeded to enumerate 11 specific factors for the FCC to evaluate in determining whether to require such a database.*' **As** matters of administrative law and logic, it is implausible that only four years after passage of the TCPA, Congress sought to make this specific mechanism of **a** national registry available to the Commission without any mention in the statutory text or legislative history and without the express limitation in the TCPA that such a database must be efficient, effective, and not result in costs to subscribers.

Not only is there no authority for the Commission to do this, but the exercise of jurisdiction is precluded by the specific grant of authority to the FCC. Further, the Commission's proposal would directly contradict the FCC's consideration — and rejection of—a national call registry in its rulemaking implementing the TCPA in 1992. In its rulemaking, the FCC found that such a national do-not-call list would be "costly and difficult to establish and maintain in a reasonably accurate form." ***Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7*** FCC Rcd 8752, ¶ 14 (1992) (the "TCPA Order"). Specifically, the FCC found that the high costs of such a database, ranging from $20 million to $80 million in the first year, and **$20** million per year thereafter,[22] made it likely that such costs would be passed through to consumers, in direct contravention of the TCPA's instruction that a national database not result in additional charges to residential subscribers, and as against public policy. *Id.* at ¶ 14 n.24. Accuracy, time lag, privacy[23] and consumer choice concerns also weighed against creation of a national registry. ***Id.*** at ¶ 15. Accordingly, the FCC determined that it could not justify such a database as meeting the statutory requirements that it be an "efficient, effective, and economic" means of preventing unwanted telephone solicitation. The FCC concluded, "In view of the many drawbacks of a national do-not-call database, and in light of the existence of an effective

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[21] **47** U.S.C. § 227(c)(3)(A)-(L). The legislative history also references the national database. ***See generally*** **H.R.** Rep. No. 103-317, LEXSEE 102 h. rpt 317, 23-28 (1991).

[22] TCPA **Order** at ¶ 11

[23] It **would** indeed be ironic if the Commission's proposed national do-not-call registry were to threaten the privacy of the very consumers whose privacy interests the *Commission* purports to advance through **its** proposal.

alternative (company-specific do-not-call lists), we conclude that this alternative is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations."[24] Rather, the FCC selected company-specific do-not-call lists, which more effectively preserve consumer choice without overly burdening legitimate telemarketing activities. *Id.* Certainly, another independent regulatory agency with at best very general authority should not do what the specifically charged agency has decided not to do.

In the NPRM, the Commission offers only a conclusion that its proposed national database is "consistent" with the FCC's regulations,[25] but does not provide any attempt to explain how the absence of any mention of a national registry in the Telemarketing Act's text or legislative history is consistent with specific textual references in the TCPA. More conspicuously absent from the NPRM is an explanation of how the database is consistent with the explicit instruction in the legislative history to the Telemarketing Act that "[t]he [Commission] also should take into account the obligations imposed upon all telemarketers by the Telephone Consumer Protection Act of 1991 *to avoid adding burdens to legitimate telemarketing*." House Report at 8 (emphasis added). In other words, any regulations adopted by the Commission under the Telemarketing Act may not add any burdens to legitimate telemarketing activities in addition to those measures promulgated by the FCC pursuant to the TCPA. As explained more fully elsewhere in these comments, it is obvious that the enormous cost and administrative difficulties for telemarketing firms to purchase, administer and update a national database adds burdens *substantially beyond* those created by the FCC's requirement of company-specific databases in the TCPA Order. Accordingly, the Commission's proposed national registry defies Congress' instruction that it not *add* any burdens to legitimate telemarketing activities beyond those imposed pursuant to the TCPA.

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[24] TCPA Order at ¶ 15.

[25] 67 Fed. Reg. at 4519.

Notwithstanding the Commission's assertion, its proposed national database would be anything but "consistent" with the FCC's approach. For example, the proposed two-year trial period for the Commission's national database, after which time it promises to "review the registry's operation to obtain information about the costs and benefits of the central registry, as well as its regulatory and economic impact in order to determine whether to modify or terminate its operation," 67 Fed. Reg. at 4517, is utterly *inconsistent* with the approach Congress set forth for consideration of a national registry in the TCPA. The FCC was bound to, and did, consider costs of a national database ***before*** ordering that such a database be established. It would be entirely inconsistent for the Commission in this rulemaking to ignore the conservative cost estimates of $20 million to $80 million and the administrative difficulties of a national do-not-call list considered in the FCC's rulemaking and promise to examine those costs *after* imposing them on legitimate telemarketing activities for two years. As the TCPA's text shows, Congress wanted these costs considered ***before*** any such database is established pursuant to a rulemaking at the FCC. This guidance given to the FCC should be considered by the Commission. The NPRM proposal of a two-year review sets up an "experiment phase" during which there could be costly implications to the industry and frustration to consumers should it be reversed.

If the FCC were to initiate a subsequent rulemaking reversing its position that a national do-not-call registry would be costly and administratively unworkable, the FCC would face a burden in justifying its changed position[26] and, of course, would have to adhere to the statutory instruction that such a database not result in costs to subscribers. However, whatever the merits of such a proceeding, it is clear that when Congress wanted an agency to consider a national do-not-call registry, it stated *so* explicitly in legislation. As such reference is absent from the Telemarketing Act, the Commission's assertion of authority to impose such a database is

[26] Under Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, an agency choosing to alter its regulatory course "must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." ***Greater Boston Television Corp. v. FCC***, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2233.29 L. Ed. 2d 701 (1971); ***accord Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co***, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). A change in policy must be supported by record evidence. ***Fox TV Station, Inc. v. FCC***, No. 00-1222 (D.C. Circuit February 19,2002).

inconsistent with the congressional approach to determine the need for a national do-not-call database.

4. *Existing Business Relationship: Effect of National Do-No[-Call Registry, Relation io Company-Spec@ Registry*

The Commission attempts to reconcile its disregard for congressional intent not to curtail legitimate telemarketing activities by arguing that in the case of consumers with existing business relationships its national database preserves a customer's choice to receive calls from specific companies through "express verifiable written authorization." 67 Fed. Reg. at **4519.** However, in addition to being largely duplicative of The **DMA's** existing database, this proposed "solution" violates congressional intent not to burden legitimate telemarketing. Implementing a system for consumers with specific existing business relationships to opt in to telemarketing calls from those companies would be cost prohibitive in time, development, and maintenance. It ignores the very essence of telemarketing as a business practice, which presents options both to customers who are familiar and to consumers who may be unfamiliar with the specific company or product offered. The national call registry would negatively impact sales that would have occurred to both to categories of consumers, penalizing both the legitimate telemarketing firm that Congress sought to protect and the customer or consumer who might want to consider or receive a specific product of which he is unaware. This is particularly the case with customers who had previously chosen to do business with a specific company. In a **$274.2** billion industry, these losses to legitimate telemarketing could have a very negative impact. **As** the legislative history demonstrates, these kinds of losses from legitimate telemarketing practices were **not** what Congress envisioned in granting the Commission limited authority over deceptive and abusive practices.

Legitimate telemarketing is preserved by the more targeted nature of company-specific do-not-call lists in the current Rule. In an apparent effort to create the perception that an individual could elect those specific companies that the individual gives permission to call, the Commission proposes to allow consumers to remove themselves from the national do-not-call list with respect to individual companies. The ability of consumers *to* exempt specific companies from the database is not the surgical fool the Commission presents it to be,[27] but rather a burdensome and unwieldy instrument that exceeds the Commission's circumscribed jurisdiction over legitimate, non-fraudulent, non-deceptive and non-abusive telemarketing. Managing these "opt-in" lists alone and in combination with the multiple other lists would be a significant expense to business. This would be even more complex if businesses must obtain "opt ins" from their own customers.

Management of the Commission's proposed selective day and time opt-out would add even further complexity. The use of "opt-in" lists will not be a realistic option for many companies. It will be particularly unmanageable for retail operations to manage a do-not-call list with an opt-in as a result of the coordination that would need to occur between clerks at stores and the larger corporate structure. It would be impractical for all but the most sophisticated data processors to cost effectively integrate these lists in a way that produces a list of individuals whom they are able to call. It also is unlikely that consumers will remember to whom they gave permission, which will result in confusion for consumers and for enforcement authorities.

E. The Proposed National Do-Not-Call List Unconstitutionally Restricts Commercial

The FTC proposes significant restriction upon advertising and promotions by means of telephone calls. Commercial speech, including marketing appeals, is, of course, protected by the First Amendment. ***See, e.g., Shapero v. Kentucky Bar Ass'n***, 486 U.S. 466 (1988) (striking down ban on attorney solicitations); ***Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n of N.Y.***, 447 U.S. 557 (1980) (***"Central Hudson"***).[28]

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[27] Industry generally supported the more targeted nature of company-specific do-not-call lists. ***See.*** *e.g.*, **DMA** comments in the Commission's prior telemarketing rulemaking proceedings.

[18] ***See also Virginia Stare Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.***, 425 U.S. 748,770 (1976) ("people **will** perceive their own best interests if only they are well enough informed, **and. . .** the best means to that end *is* to **open** the channels of communication rather than **to** close them.").

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The proposed Rule would fail scrutiny under the First Amendment's commercial speech doctrine for two reasons.[29] First, as was the case with the statutory restrictions on broadcast adcertising of gambling struck down in ***Greater New Orleans Broadcasting Ass'n, Inc. v. United States,*** 527 ***U.S.*** 173 (1999) ***("Greater New Orleans"),*** and with the alcohol advertising regulatory regime struck down in ***Rubin v. Coors Brewing*** Co., 514 ***U S .*** 476 (1995) ***("Rubin"),*** the proposed Rule is "so pierced with exemptions and inconsistencies" by virtue of the numerous limits on the Commission's jurisdiction "that the government cannot hope to exonerate it."[30] A core concern of the ***Central Hudson*** analysis is that government not restrict commercial speech in a highly selective fashion that distorts the marketplace. ***See Rubin,*** 514 ***U.S.*** at 481; ***Virginia Board of Pharmacy***, 425 U.S. at 765 (1976). The proposed Rule suffers from precisely this defect. The gaping exemptions and inconsistencies in the regulatory scheme **prevent** the proposed Rule from sufficiently advancing the government's stated purpose of protecting privacy.

Second, the proposed Rule fails to "carefully calculate the costs and benefits associated" with imposing its regulatory do-not-call list. ***See City of Cincinnati v. Discovery Network,*** 507 U.S. 410, 417 n.13 (1993) ***("Discovery Network")***; ***U.S. West v. Federal Communications Commission,*** 182 F.3d 1224, 1235 (10th Cir. 1999), ***cert. denied,*** 120 ***S. Ct.*** 2215 (2000) (*"U.S. West")* (striking down ***FCC*** privacy regulations that limited commercial speech where the agency failed adequately to explain why it rejected less stringent options for accomplishing a statutory mandate to protect privacy)."[31] The proposed Rule would impose an extensive, costly regulatory

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[29] Although these comments focus on First Amendment infirmities of the proposed Rule's do-not-call list requirement, other aspects of the proposed Rule, such as its ban on the use ***of*** preacquired account **information,** also violate the First Amendment.

[30] ***Greater New Orleans, 527*** U.S. at 189, *citing* ***Rubin.*** 514 U.S. at 488

[31] *See* ***also State of Missouri et al. v. American*** *Blast Fax, Inc., et al.*, **Case No. 4:00CV933 SNL** *slip opinion* **2002** U.S. **Dist.** LEXIS 5707 (E.D. Mo., March 13, **2002).** (This recent case invalidates on First Amendment grounds **§ 227** of the Telephone Consumer Protection Act, 47 U.S.C. **§ 227,** as it relates to the prohibition on sending unsolicited advertisements by **fax** absent **an** express recipient opt in. The court holds that the government failed to **meet** its burden under any ***of*** the prongs of the ***Central Hudson*** test described below).

regime that would be particularly onerous for communications with existing customers. Moreover, this onerous regime would apply selectively to only a limited segment of the telemarketing industry because of the FTC's jurisdiction. The Commission has not explained, and cannot adequately explain, why it would choose this approach, rather than relying upon self-regulatory commitments that are enforceable under the Commission's unfair and deceptive trade practice authority and that cover a far greater percentage of telemarketing calls.

Government regulation of commercial speech that does not mislead or relate to illegal activity Is subject to a three-part test. *Central Hudson,* 447 U.S. at 564. First, the government must show a substantial interest it intends to achieve through the regulation. Second, the regulation must directly advance the asserted interest. Third, the regulation must be narrowly tailored and no more extensive than necessary to serve the government's substantial interest. *Central Hudson,* 447 U.S. at 566. The commentary to the proposed Rule does not claim that it is designed to reach misleading telemarketing or telemarketing relating to illegal activity, and the Commission has a wide range of other tools to address such deception. The proposed Rule's national do-not-call list fails most egregiously the second and third prongs of the *Central Hudson* analysis, which we therefore discuss in greater detail.

*1. The Proposed Rule Contains So Many Exceptions **that** it Fails io Advance its Slated Interest*

The Commission bears the burden under the second prong of *Central Hudson* to demonstrate that a speech restriction "directly and materially advances the governmental interest asserted." *See, e.g., Greater New Orleans,* 527 U.S. at 188; *Edenfield v. Fane,* 507 U.S. 761, 770 (1993). The government must show that a "ban will *significantly"* advance the government's interest, ***44 Liquorman** Inc. v. Rhode Island,* 517 U.S. 484, 505 (1996) (plurality opinion) (emphasis added), and "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. In this case, as in *Greater New Orleans* and *Rubin,* the government's stated interest in protecting privacy **is** undermined directly and fatally by the significant exceptions in the statute that prevent the proposed Rule from "directly and materially advanc[ing]" this goal. *See Greater New Orleans,* *527* U.S. at 188, ***citing*** *Central* ***Hudson,*** 447 U.S. at 564; *see also* ***Rubin,*** 514 U.S. at 487.

A national do-not-call list imposed by the Commission would be riddled with exceptions and would be far *too* selective in scope to accomplish **its** goal materially. Although the proposed Rule would saddle FTC-regulated industries with extremely costly barriers to commercial speech accomplished through telephone communications with customers, it would not, and cannot, cover many other entire industries. *Banks,* savings and loan institutions, common carriers (such as domestic and international telephone companies), insurers regulated by state law, domestic and foreign airlines and other industries subject to Federal Aviation Administration regulation, companies subject to the Packers and Stockyards Act, as described in Section II.C above, would be wholly unaffected by the proposed Rule. *See* 15 U.S.C. §§ 41 ***et*** *seq.* Moreover, the proposed Rule would have no effect whatsoever on intrastate telemarketing calls.

As the Supreme Court warned in *Greater New Orleans,* "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." **527** U.S. at 194. The proposed Rule suffers from precisely this problem. Significant portions of the telemarketing industry would remain completely unaffected by the Rule, free from the heavy burdens that FTC-regulated marketers would face, even though they were delivering virtually the same message. The resulting incentives would "merely channel [telemarketers] to one [industry] from another." *Id.* at 189.

The result is the same sort of "overall irrationality" that led the Court in ***Rubin,*** 514 U.S. at 486, to strike down a regulatory regime that selectively prohibited listing alcohol strength on beer labels for the purpose of discouraging "strength **wars"** and thus curbing alcoholism, id. at 483-85, while separate regulations permitted (in some cases, required) labeling of alcohol content on other types of alcoholic beverages, and allowed a variety of other methods of advertising alcohol content in various beverages. *Id.* at 488. **As** was the case in ***Rubin*** and *Greater* ***New*** *Orleans,* the regulation proposed here, riddled with a variety of gaping holes in its application and inconsistent regulatory regimes, reveals Congress' "decidedly equivocal" attitude toward adopting a regulatory do-not-call list, *Greater New Orleans*, **527** U.S. at **187,** assuming that Congress ever intended to give the Commission such authority. The necessary "fit" between the proposed Rule and the government's interest simply does not exist here. *Rubin*, **514** U.S. at **490.**

2. The Proposed National Do-Not-Call List Is Not Narrowly Tailored and Is Far More Extensive Than Necessary

To survive scrutiny under the third prong of the *Central Hudson* analysis, restrictions on commercial speech must be narrowly tailored to achieve the government's purpose. *See Central Hudson*, **447** U.S. at **566;** *see also* ***Rubin,*** 514 U.S. at 486.[32] The proposed Rule clearly does not satisfy this standard. The Supreme Court held in *Discovery Network* that restrictions on commercial speech must "carefully calculate the costs and benefits associated" with the restriction. **507** U.S. at **417** n.13. Careful analysis of "costs and benefits" associated with the burdens on speech created by the proposed national do-not-call list is completely absent from the statute, its legislative history, the proposed Rule, or the Commission's commentary.

In U.S. West, the Tenth Circuit struck down FCC rules implementing the customer privacy provisions of the Telecommunications Act of **1996, 47** U.S.C. § 222, because those rules violated the First Amendment. Section 222 requires a telecommunications carrier to obtain customer "approval" in most circumstances before using, disclosing, or permitting access to certain customer information. The FCC implemented the statute by imposing an opt-in requirement, with a significant exception for **marketing** within the scope of a prior business relationship. The Tenth Circuit struck down the FCC's privacy rules.

The *U.S. West* decision makes clear that stringent restrictions on commercial solicitation are vulnerable to challenge under the Supreme Court's *Central* ***Hudson*** test. The court explained that "when . . . alternatives are obvious [and] restrict substantially less speech," choice of a more stringent rule indicates a lack of narrow tailoring and is far less likely to withstand First

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[12] ***See also 44 Liquorman,*** **517 U.S. at 529 ("The availability of less burdensome alternatives** to **reach the stated goal signals** that **the** tit **between the legislature's ends and the means chosen to accomplish** those **ends may be too imprecise to withstand First Amendment scrutiny.").**

Amendment scrutiny.[33] It is noteworthy that the privacy restriction at issue in *U.S. West* was less onerous than the do-not-call requirement in the proposed Rule. In *U.S. West,* the invalidated privacy rules exempted marketing offers for any category of service that an existing customer received from a carrier, and they allowed carriers to obtain approval either orally, electronically or in writing. In distinct contrast, the proposed Rule does not provide for any established customer relationship exemption, and existing consumers who have placed their names on the national do-not-call list could only resume receiving calls if they opt-in in writing. 67 Fed. Reg. at 45 19 (requiring "express verifiable authorization").

U.S. West also underscores that if a government agency restricts commercial speech, it bears a significant burden of proof to defend the restriction. The regulator must demonstrate "that [the alternative] strategy would not sufficiently protect consumer privacy [employing] the careful calculation of costs and benefits that our commercial speech jurisprudence requires." *U.S. West*, 182 F.3d at **1239.** The government must build a clear record that justifies its policy choice. It must offer specific evidence, and may not rely upon "mere speculation" to justify its decision to impose a more restrictive regulatory scheme. ***Id.***[34]

The commentary to the proposed Rule defends its national do-not-call list proposal based upon evidence such as consumer comments "unanimously" disfavoring telemarketing calls and the purported "burden" on consumers imposed by the existing company-specific do-not-call rule. 67 Fed. Reg. at 4518. The commentary also states that "[c]onsumers have demanded more power to determine who will have access to their time and attention while they are in their

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[33] *U.S. West,* 182 F.3d at **1238** and n.11 ("We do not. . . **strike** down regulations when ***any*** less restrictive means would sufficiently serve the state interest. We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring.'').

[34] ***See also State of Missouri et al. v. American Blast Fax, Inc., et al.***, **Case** No. 4:00CV933 SNL **slip opinion** 2002 U.S. Dist. LEXIS 5707 **(E.D.** Mo., March 13, 2002) (finding *inter alia* that while the *opt in* requirement of the Statute prohibiting unsolicited fax advertisements failed to meet the ***Central Hudson*** standard, an ***opt out*** strategy might have met the requirement that the regulation on speech "promote the government's interest, yet be less intrusive to First Amendment rights," ***id.*** at '39, and that the legislative history as to the burden imposed **by** such faxes was too speculative to show the government's substantial interest, ***id.*** at *34).

homes." *Id.* Although the commentary notes that "consumers would benefit from a national registry," as a "one stop" mechanism, 67 Fed. Reg. at 45 19, it fails to offer evidence to show why this would enhance privacy as compared with existing do-not-call registries such as the large registry currently operated by The DMA. This showing is plainly insufficient to justify the proposed Rule under *U.S.* ***West*** and *Discovery Network*.

The Commission has not considered that voluntary do-not-call lists already exist and provide effective limits on unwanted telemarketing calls. The proposed Rule notes that The DMA's Telephone Preference Service lists over 4 million consumers, and that DMA members are "required to adhere to the list" under threat of expulsion. 67 Fed. Reg. at 4517 and n.241. As discussed above, The **DMA** membership accounts for approximately 80% of the telemarketing market, across all industries and covering intrastate as well as interstate calls beyond the jurisdiction of the FTC. In fact, the FTC web site refers consumers to The DMA service on a page titled "Federal Trade Commission Consumer Alert: Privacy: What *You* Do Know Can Protect You." ***See*** <http://www.ftc.gov/bcp/conline/pubs/alerts/privprotalrt.htm>. Yet, the proposed Rule does not offer any evidence that the proposed do-not-call list would be more effective than enforceable self-regulation. "[C]onjecture . . , is inadequate to justify restrictions under the First Amendment." *U.S. West*, 182 F.3d at 1238 ***(citing Edenfield***, 507 U.S. at 770-71).

The proposed Rule also fails to analyze the very significant costs it would impose in the context of communications by businesses to consumers with whom they have a prior business relationship, as required by ***Discovery Network***, 507 U.S. at 417 and *U.S. West*, 182 F.3d at 1238-39. The proposed Rule is on particularly shaky ground because it would create a very costly regulatory regime for any commercial speech offered via telecommunications to existing customers when other "obvious less burdensome alternatives" exist. ***See Discovery Network***, 507 U.S. at 417 n.13.

As discussed above, the proposed national do-not-call list does not cover intrastate calls, nor can it, given the inherent limitations of the regulatory scheme and the FTC's jurisdiction. Yet, unless state-specific lists are preempted, businesses will be forced to bear a very significant administrative burden of complying with multiple inconsistent and overlapping state and **federal** regulations on a per-call basis. Companies with multiple call centers would need to track which center calls which household on a state-by-state basis, and assign such calls according to the more favorable regulatory regime. This would be very costly compared to today's methods. In addition, the current Rule will continue to require companies *to* honor existing company-specific do-not-call opt out lists, and the proposed Rule would require frequent scrubbing of call lists, and maintenance of lists of individuals opting in to receive calls through their "express verifiable written authorization" despite their general national opt out. 67 Fed. Reg. at 4519. This morass of restrictions would impose new costs on both businesses and consumers and would decrease legitimate and beneficial communication between consumers and businesses. **As** a result of these increased costs to business, consumers' access to truthful information relevant to their shopping and spending decisions would be curtailed as fewer companies *are* able to afford telemarketing as a form of advertisement.

The proposed Rule also fails to study the inconvenience and the costs to consumers of losing access to valuable information and opportunities from companies with which they already do business. The Commission would require that businesses' existing customers provide "express verifiable written authorization" to opt back in to communications after they have been placed on the national do-not-call list. *Id*. By requiring consumers on the proposed national do-not-call list to opt in to receive information from any particular business, the proposed national do-not-call list would create a substantial barrier to existing customers receiving information and opportunities they would value from businesses they know and trust. For example, the proposed national do-not-call list would prevent sellers from informing consumers with whom the seller has an established business relationship about special sale price offers or other promotions and product information consumers would welcome.[35] Consumers would lose opportunities to save money through access to special sales and to other beneficial information that informs their

[35] *Cf. Virginia Board of Pharmacy*, **425** U.S. at 765 ("It **is a** matter **of public** interest that [consumer] decisions, in the aggregate be intelligent and well-informed. To this end, the free **flow** of information is indispensable.").

purchasing decisions.[36] Society-at-large benefits significantly from information available from the commercial speech that the proposed national do-not-call list would restrict. Economic efficiencies for consumers and businesses result from better-informed consumers.

These costs to both business speakers and consumer listeners must be weighed in the analysis of costs and benefits as required by *Discovery **Network*** and *U.S. West*.

3. <u>Rowan v. U.S.</u> Cannot Justify the Proposed Restriction

If the Commission intends to use *Rowan v. United States*, 397 U.S. *728* (1970) to defend the proposed Rule, such reliance would be misplaced. The statute at issue in *Rowan*, 39 U.S.C. § 4009, allows recipients of postal mail "which the addressee in his sole discretion believes to be erotically arousing or sexually arousing" to identify a specific source of offensive material to the Postmaster General. The Postmaster General must order the sender and its agents to delete the named addressee from all mailing lists owned or controlled by the sender, and to refrain from mailings to the named addressee as well as any exploitation of mailing lists bearing the named addressee. The statute under review in *Rowan* is a *company-specific* opt-out requirement that relates to a *specific individual* for a *specific **type of content.*** By contrast, the proposed Rule would establish an across-the-board opt-out for communications from all FTC-regulated companies, and would allow anyone dialing from a phone number on a network capable of sending the telephone number to opt an entire household out of such calls.

The *Rowan* court did not have before it and did not address the constitutionality of a broad universal opt-out scheme, applicable to established business relationships and individuals who would not have chosen to discontinue receipt of such solicitations. In fact, in their concumng opinion, Justices Brennan and Douglas specifically raised constitutional objections to

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"*See 44 Liquormart*, 517 U.S. at **1504** (stating, "Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on 'commercial speech' for vital information about the market. . . . [T]own criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of **all** things, an advertisement for voyages to Barbados." [internal citations omitted]).

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the possibility that parents could include the name of a "minor" child under 19 as an additional named addressee in an opt-out request, despite the fact that 18 year olds had obtained majority, but acknowledged that the issue was not raised in this case and therefore not addressed or resolved. *Rowan*, 397 U.S. at 741.

The *Rowan* court made clear that an "affirmative act by an addressee" must be directed to "*that* mailer" before the right to communicate could be circumscribed. *Rowan*, 397 U.S. at 737 (emphasis added). This differs markedly from the universal opt-out in the proposed Rule. The individualized single-mailer opt out permitted under *Rowan* allows a recipient to stop objectionable material after the recipient has determined that material already received from a particular advertiser is objectionable. The universal opt-out in the proposed Rule, in stark contrast, would have the effect of stopping all telemarketing to a household, without regard to whether the recipient would find individual solicitations or promotions objectionable, useful, entertaining or welcome, and without regard *to* consumers' legitimate expectations of ongoing commerce with trusted and established business relationships.

F. An Exception for Contacting Customers [illegible] Relationship Exists Should Be Created if a National Do-Not-Call List Is Established

The proposed Rule's failure to include an exemption for businesses to contact individuals with whom they have an existing business relationship is a glaring omission. **If** a national do-not-call list ultimately is created by the Commission, it should preserve the ability of businesses to communicate with individuals with whom they have a pre-established business relationship but who register for the do-not-call list.

In the Notice, the Commission relies on its rationale from the 1995 rulemaking to support its conclusion in 2002 not to exempt telephone calls made to any person with whom the caller has a **prior** or established business or personal relationship.[37] The stated rationale is that such an

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[37] **67** Fed. Reg. at **4532**